CASE NO. 88-722

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLAYTON STAPLETON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED:

DOES AN ACCUSED HAVE A DUE PROCESS RIGHT TO A CAUTIONARY INSTRUCTION ON THE UNRELIABILITY OF ACCOMPLICE TESTIMONY, WHEN HE IS STATUTORILY ENTITLED NOT TO BE CONVICTED SOLELY ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE AND THE JURY IS MADE AWARE OF FACTORS AFFECTING THE RELIABILITY OF ACCOMPLICE TESTIMONY IN GENERAL, AND FACTORS AFFECTING THE RELIABILITY OF THE ACCOMPLICE TESTIMONY IN THIS PARTICULAR CASE?

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STATEMENT OF THE CASE

On August 28, 1986, this Petitioner was indicted for three counts of Aggravated Trafficking in Cocaine and one count of Permitting Drug Abuse. Two of the Aggravated Trafficking charges were first degree felonies and carried mandatory sentences of five years each. The third Aggravated Trafficking charge was a third degree felony with a mandatory sentence of 18 months. Also charged in the same indictment were Kitty Bailey and Anthony Marinelli. Petitioner pleaded not guilty and sought by motion suppression of certain evidence obtained by search warrant at his residence, which motion was overruled.

Trial commenced on March 9, 1986 and Petitioner was convicted of all counts of the indictment. For the two felony one counts of Aggravated Trafficking he was sentenced to two concurrent terms of 4 to 25 years incarceration, each term including a term of actual incarceration of five years. Consecutive to those terms was one year term (with an eighteen month term of actual incarceration) on the felony three count of Aggravated Trafficking. Petitioner was given a six month sentence on the Permitting Drug Abuse charge.

Notice of Appeal was timely filed and the Court of Appeals for Montgomery County affirmed his conviction. The Ohio Supreme Court declined review and Petitioner now seeks review in the United States Supreme Court.

STATEMENT OF THE FACTS

In investigating a complaint of an illegal gambling machine at the Cabaret Lounge in Harrison Township, plainclothes detectives from the Montgomery County Sheriff's Office met Kitty Bailey, a barmaid at the lounge, who indicated that she was willing to obtain cocaine for them (Trial Transcript, hereinafter "Tr.", 51, 52, 159, 352, 353). She claimed she had two sources and so on July 29, 1986 she obtained a gram of cocaine for Det. Douglas Hoover from an Anthony Marinelli (Tr. 52, 353). On August 1, 1986, Bailey set up another sale between Marinelli and the police. They purchased one half of an ounce of cocaine from him for $1,100.

The detectives shortly thereafter told Bailey that they wanted to buy one and one half ounces of cocaine but they didn't like the way Anthony Marinelli did business (Tr. 57, 165). She called the Petitioner, Clayton Stapleton, with whom she resided, from the Cabaret Lounge. After the call, she told the detectives that she could get them one and one half ounces of cocaine from Petitioner for $2,950.00 (Tr. 57, 165, 356). Shortly after Bailey had called Petitioner and set up the deal, Petitioner himself came into the Cabaret Lounge (Tr. 57, 357). Bailey explained that the Petitioner was just

checking out the people with whom he was doing business (Tr. 357).

That sale took place on August 5, 1986 (Tr. 59). She brought the ounce and a half in half ounce increments and the police field tested it and paid her. Bailey testified that she had obtained the ounce and a half of cocaine from Petitioner, at his house (Tr. 169).

After that sale, the detectives told Bailey that they were interested in buying four to six ounces, and asked if they could get a better price for that quantity (Tr. 171, 360). Petitioner told Bailey he had only four ounces left, but he would sell it to her for $1,700 an ounce (Tr. 172). She contacted Hoover, and the deal was set up for August 8. The parties were to meet at the Holiday Inn on Wagoner Ford Road (Tr. 173).

According to Bailey, when she went to Petitioner's house to get the cocaine from him on August 8, he was fishing in his pond with a woman named Brenda Day (Tr. 174). Petitioner asked Bailey if she wanted him to accompany her and she told him that she'd feel safer if he did come along (Tr. 174-175). He took the bag containing the cocaine from his hat and handed it to her (Tr. 175). She took her wallet out of her purse to make room for the cocaine, and stashed it under the seat in Petitioner's truck (Tr. 194). Petitioner then drove her to the Holiday Inn but did not go in (Tr. 173).

Brenda Day testified that on the afternoon of August 8, she was at the Petitioner's house fishing with him in his pond when he answered a telephone call on his cordless phone from a mutual friend, Dave Thomas (Tr. 299). In the course of the conversation Brenda heard Petitioner say that he had wanted Thomas to accompany Kitty to North Dixie Drive to take care of some business and he would have paid him $100.00 (Tr. 300). After that call, Petitioner told her that he had to go up on North Dixie with Kitty, and that she should just remain where she was unless something went wrong (Tr. 301). After Bailey arrived, Day saw Petitioner get into the safe in his garage and take out something that she could not identify and

put it in his hat. Petitioner then left with Bailey (Tr. 301, 305).

Det. Joseph Steuer had set up surveillance of Petitioner's residence at about 4:45 p.m. (Tr. 371). From his vantage he saw Petitioner leave in his pickup truck at about 5:30 p.m. (Tr. 372). He could not see if there was a passenger in the truck (Tr. 372).

Det. Orihood set up surveillance at the Holiday Inn (Tr. 397). He testified that Petitioner arrived there at about 5:45 p.m., dropped off a white female and then parked and got out and sat in the grass (Tr. 390, 405).

After Petitioner dropped Kitty Bailey off she met Dets. Hoover and Ware at the bar in the motel but they all soon left to make the sale at a different motel (Tr. 173). Upon their arrival there Det. Munson was waiting (Tr. 173). She removed the cocaine from her purse and gave it to Hoover who weighed and tested it (Tr. 174). He then paid her the agreed upon price (Tr. 174). Shortly thereafter the detectives identified themselves and arrested Bailey (Tr. 67, 364).

After Bailey's arrest, Det. Orihood was directed to arrest the Petitioner, who was still waiting outside of the Holiday Inn (Tr. 400). Bailey's wallet was found under the seat of Petioner's truck (Tr. 401). A search warrant was executed at Petitioner's residence and 27.13 grams of cocaine were found inside a vase in his dining room (Tr. 373, 376, 33-34).

In exchange for her testimony against Petitioner, Bailey was permitted to plead to reduced charges. Her indictment was for four counts of Aggravated Trafficking, including two which carried terms of actual incarceration of five years each, and one which carried a term of actual incarceration of three years. She pled guilty to three counts of Aggravated Trafficking, two of which carried sentences of actual incarceration of eighteen months (Ex. A, Tr. 188).

Petitioner testified in his own behalf that he was not involved in any way in drugs (Tr. 458). He testified that Bailey

had been living with him ever since he'd hired her to clean his house in early July (Tr. 468). He said that he had no idea that there was cocaine in his vase, and did not know Bailey was delivering cocaine to the Holiday Inn (Tr. 472). When Dave Thomas couldn't accompany her there he agreed to take her just to get rid of her because he had another date, Brenda Day, at his house waiting for him (Tr. 474).

The defense also introduced into evidence a letter written by Kitty Bailey a few days after her arrest (Tr. 199-201). The letter exonerated Petitioner and named Anthony Marinelli as the source of the cocaine sold on August 5 and August 8 (Tr. 199-201). Bailey testified that some weeks after she wrote it she showed the letter to her ex-husband in Belmonte Park, then tore it up and threw it away (Tr. 185, 288-289). The Petitioner introduced evidence that a park worker found the letter, showed it to a friend who knew Petitioner, and that friend gave it to Petitioner (Tr. 430, 439, 446, 449). Bailey explained that she was distraught when she wrote the letter, and saw it as a means to get back at Marinelli who had beaten her on New Year's Eve, and who regularly beat her sister (Tr. 206).

ARGUMENT

Petitioner argues that he had a due process right to have the jury given a cautionary instruction on the credibility of accomplice testimony, and that the trial court's refusal to so instruct the jury was a constitutional violation. This Court has never so held, and it is Respondent's position that the failure of the trial court to give the requested instruction was not a denial of due process.

At the time Petitioner was convicted he had a statutory right under the law of Ohio not to be convicted on the uncorroborated testimony of an accomplice. Ohio Rev. Code § 2923.03(D). That statute was amended as of September 16, 1986. From that date on, a person could be convicted on the basis of the uncorroborated testimony of an accomplice. However, if an accomplice testified against an accused, the accused was entitled to an instruction, set out in the statute:

> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

The crimes in this case were committed on August 5 and August 8, 1986, prior to the effective date of the new Ohio Rev. Code § 2923.03(D). The trial commenced March 9, 1987, after the new Ohio Rev. Code § 2923.03(D) went into effect.

There is no dispute that Petitioner was entitled to the protection of the former Ohio Rev. Code § 2923.03(D). That is, Petitioner was entitled to not be convicted on the uncorroborated testimony of an accomplice. While Defendant is

entitled to the greater protection of the former R.C. 2923.03(D) due to the date the crime was committed, he is not entitled under the law of Ohio to the cautionary jury instruction set out in R.C. 2923.03(D), as amended. The amended statute is prospective only, and may not be applied to a defendant charged with committing an offense prior to that date. *State* v. *Mullins*, 34 Ohio App. 3d, 192 (1986). Prior to the enactment of the mandatory cautionary instruction provided by revised Ohio Rev. Code § 2923.03(D), a cautionary instruction such as requested by Defendant was held to be improper as constituting an improper comment upon the evidence. *State* v. *Flonnory*, 31 Ohio St. 2d 124, 285 N.E. 2d 726 (1972).

Petitioner's position is that he is entitled not only to the earlier and greater protection of not being convicted on the uncorroborated testimony of an accomplice, he is also entitled to a cautionary instruction on accomplice testimony, and the denial of that instruction is a due process violation. None of the cases cited by Petitioner support that conclusion. The cases cited by Petitioner discuss whether the failure to give a cautionary instruction is an error, or is plain error, but do not find that the failure to so instruct on facts similar to those herein is a due process violation. *State* v. *Beasley*, 519 F. 2d 233 (5th Cir. 1975) is representative. The Court in *Beasley* cited earlier cases for the propositions that the instruction, if requested, should be given but failure to give the instruction was not plain error. The Court found that Defendant's substantial rights were not prejudiced by the failure to instruct on accomplice testimony, even where the accomplice testimony was uncorroborated and the Court had included in the charge a "presumption of truthfulness of witnesses" instruction.[1]

[1] This instruction provided:

> We start out with the presumption that every witness speaks the truth. However, this presumption may be overcome in several ways, such as the manner in which the witness testified, by the character of his testimony, by the contradictory evidence, or by his motives.

In *United States* v. *Scelzo*, 810 F. 2d 2, (1st Cir. 1987) the court held that it was not necessarily reversible error to refuse to give a requested cautionary instruction. That Court noted that while "it is prudent for the court to give a cautionary instruction, even when one is not requested, failure to do so is not automatic error especially where the testimony is not incredible or otherwise insubstantial on its fact." In *Scelzo*, the testimony of the accomplice was corroborated, the Defendant's attorney brought out on cross-examination the accomplices' personal interest in testifying against the Defendant, and the court instructed the jury to consider every witnesses' interest or lack of interest in the case. In view of those circumstances, the Court of Appeals concluded that it was not error to refuse to give the requested instruction.

The case at bar is similar to *Scelzo*. In this case, the evidence of petitioner's guilt was corroborated by the observations of the police officers, the testimony of Brenda Day, Petitioner's arrest at the scene of the sale, and the subsequent discovery of cocaine at his residence. Additionally, the terms of the plea bargain the accomplice made were in evidence and counsel for Petitioner in cross-examination did a thorough job of demonstrating that Kitty Bailey stood to benefit by cooperating with the police. The testimony was crystal clear that Kitty Bailey had a motive to see Petitioner convicted. The factors affecting the believability of her story were clearly set out for the jury. Additionally, defense counsel in argument articulated the reasons that her testimony as an accomplice should be evaluated with caution. Finally, the court instructed the jury on the evaluating credibility of witnesses in general (Tr. 556-557).

In this situation, it cannot be said that the failure to give the requested cautionary instruction was a denial of due process. The exclusion of the instruction did not cause Petitioner's trial to be fundamentally unfair. The purpose of an accomplice instruction is to assure that the jury realizes that an admitted accomplice's testimony may be affected by the hope of a favor or conversely, by the fear of reprisal from the government, and considers this factor in weighing such

person's testimony. *United States* v. *Beasley*, 519 F. 2d 233 (5th Cir. 1975). That purpose was accomplished in this case by other means.

CONCLUSION

For the reasons discussed herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

§ 2923.03 Complicity.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

APPENDIX "B"

§ 2923.03 Complicity.

(D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."